

Parent was able and available for work, even though she restricted her work search to certain part-time hours due to her child's disability. She was a qualified individual with a disability within the meaning of the DUA part-time regulations, (formerly at 430 CMR 4.45(2), now at 430 CMR 4.45(3).)



THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

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Board Of Review Decision **Board of Review Letterhead**

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## Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to deny benefits following her separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

Benefits were denied after the review examiner determined that the claimant was not able, available, and actively seeking work, as required by G.L. c. 151A, § 24(b). After considering the recorded testimony and evidence from the DUA hearing, the DUA review examiner's decision, and the claimant's appeal, we remanded the case back to the review examiner to take additional evidence and make further findings. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the review examiner's decision and the consolidated findings.

The claimant resigned from her position on September 26, 2008. She filed a claim for unemployment benefits with the DUA but was disqualified in a determination issued by the agency on December 2, 2008. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which the claimant attended, the review examiner affirmed the agency's denial of benefits in a decision rendered on January 2, 2009.

The issue on appeal is whether the claimant is eligible for benefits if she limits her availability to part-time work in order to care for her child with disabilities.

## Findings of Fact

The DUA review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant filed a claim for unemployment benefits on October 8, 2008.
2. The claimant is the single parent of three children, ages sixteen, thirteen and seven. The claimant's seven-year-old daughter ("Daughter") had been diagnosed with Attention Deficit/Hyperactivity Disorder, Depression, and a Language Disability. As a result, the claimant needs to be home to spend time with, support, and help her Daughter.
3. The claimant's Daughter was tested and evaluated at a local hospital for children by a number of specialists in July and August 2008. The Daughter's Case Coordinator wrote a comprehensive evaluation of the findings regarding the Daughter's condition, summarizing the evaluation team's conclusions by stating:

*"In summary, [the Daughter] is a child whose cognitive abilities are difficult to characterize, with skills ranging from below average to the high average range. Her academic development is compromised as a consequence of an underlying neurologically mediated learning disorder with co-morbid ADHD. Her learning disorder is notable for strengths on some discrete language skills, but difficulties with complex language, difficulty formulating her thoughts, retrieval issues, significant visual perceptual difficulties as well as output issues which compromise the skills she has learned as they are called upon in unfamiliar and/or complex situations. In turn, these postures can also interfere in her acquisition of new skills. These difficulties already have and will continue to impact her learning and effectiveness in school.*

*"Moreover, when faced with novel or more complex tasks, [Daughter] often becomes overwhelmed, which causes her to become increasingly dysregulated and at times resistant, requiring external structure and support to allow her to proceed. [Daughter's] learning issues all exist within the context of a concrete, linear learning style, which relies on the provision of explicit structures and relevant contexts to direct her efforts. [Daughter] becomes particularly vulnerable in situations where multiple details must be recognized and incorporated within these structures. The support of her mother and school, however, is helping her to be as successful as she is in some subjects. [Daughter] works diligently to accomplish her work and her efforts should be recognized.*



"This diagnosis is consistent with the categories defined by Massachusetts Department of Education state regulation 603 CMR 28.02. Specifically, [Daughter] manifests a neurobehavioral learning disorder, which by Massachusetts state regulations is coded as:

*Neurologically mediated learning disorder*, the capacity of the nervous system is limited or impaired with difficulties exhibited in one or more of the following areas: the use of memory, the control and use of cognitive functioning, sensory and motor skills, speech, language, organizational skills, information processing, affect, social skills, or basic life functions.

*Specific learning disability*, the term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think speak, read, write, spell, or to do mathematical calculations. Use of the term shall meet all federal requirements given in federal law at 34 CFR §§300.8(c)(10) and 300.309."

4. While most recently employed, the claimant worked as a Family Education Counselor for a health center. The claimant worked in that position full time for two years until September 1, 2008, when she reduced her schedule to 9:30 a.m. until 3:30 p.m., due to the needs of her Daughter. The claimant then worked twenty-five hours per week until her resignation on September 26, 2008.

5. The claimant's schedule of work availability must accommodate her Daughter's care and support needs. The claimant is seeking work of thirty hours or less per week, because of her childcare and support needs for her Daughter. The claimant's Daughter leaves for school on the bus at 8:30 a.m. and returns home by bus at 4:00 p.m., so the claimant is available to work approximately 9:00 a.m. until 3:30 p.m. on weekdays.

6. The claimant is seeking employment in the retail, delivery, and non-profit fields. The claimant seeks work by résumé submission, in-person application and email, through at least three work-search contacts each week. Part time employment during the hours for which the claimant is available to work exists in retail and similar fields.

7. The claimant's phone service was turned off in late December 2008 for financial reasons, when she could not afford the charges.

8. In an effort to find childcare arrangements for her Daughter, the claimant discussed the situation with her father and her sister, but they could not work out any arrangements for the care of her Daughter.

9. On December 2, 2008, the Division of Unemployment Assistance mailed the claimant a Notice to Claimant of Disqualification, indicating that the claimant was disqualified from receiving benefits under Section 24(b) of the Law for the week ending October 11, 2008 and thereafter.

## Ruling of the Board

The Board adopts the DUA review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 24(b), provides, in pertinent part, as follows:

An individual, in order to be eligible for benefits under this chapter, shall ... (b) Be capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted. . .

Also relevant are DUA regulations, which allow a claimant to limit her availability for work under certain conditions. Specifically, 430 CMR 4.45 provides, in relevant part, as follows:

(1) An individual otherwise eligible for benefits may limit his/her availability for work during the benefit year to part-time employment provided, that the individual:

(a) has a prior work history of part-time employment;

(b) establishes to the satisfaction of the commissioner good cause for restricting availability during the benefits year to part-time employment and that such good cause reason is the same as existed during the prior work history of part-time employment; and

(c) is available during the benefit year for at least as many hours of work per week as used to establish the prior work history of part-time employment.

(2) Notwithstanding the provisions of 430 CMR 4.45(1), an otherwise eligible individual who does not meet the requirements of 430 CMR 4.45(1) may limit his/her availability for work during the benefit year to part-time employment provided, that the individual is:

(a) *a qualified individual with a disability*; [emphasis added]

(b) provides documentation to the satisfaction of the commissioner substantiating an inability to work full-time because of such disability; and



(c) establishes to the satisfaction of the commissioner that such limitation does not effectively remove himself/herself from the labor force.

(3) Any individual who meets the requirements of either 430 CMR 4.45(1) or (2) must be actively seeking and available for suitable work to be eligible for benefits. An offer of employment will not be considered an offer of suitable employment and the individual will not be disqualified for refusing such offer where such offer:

... (b) in the case of an individual who meets the requirements of 430 CMR 4.45(2) requires greater hours than the individual is capable of working.

After the initial hearing, the DUA review examiner disqualified the claimant, under 430 CMR 4.45(1)(2), because she lacked a prior history of part-time employment. We remanded the case for additional evidence regarding the claimant's daughter's disability. In light of the consolidated findings of fact, we conclude that the claimant does qualify for benefits under 430 CMR 4.45(2), despite her lack of prior part-time employment, because, as the mother of a disabled child, she must be viewed as equivalent to a "qualified person with a disability" for the purposes of that regulation.

430 CMR 4.45(2)(a) provides that there is no requirement that a claimant have a prior history of part-time employment if the claimant is a "qualified individual with a disability." In interpreting this section, we are mindful of federal law. The U.S. Department of Justice has promulgated regulations to enforce the American with Disabilities Act of 1990, as amended, (ADA), 42 USC § 12101, et seq. Prohibitions against discrimination by public entities are set forth under 28 CFR § 35.130. As a public entity, the DUA must comply with this regulation.

Specifically, 28 CFR § 35.130 provides, in pertinent part, as follows:

(a) *No qualified individual with a disability* shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, . . .

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual . . . because of the known disability of an individual with whom the individual . . . is known to have a relationship . . .

(Emphasis added.)

We conclude that, in circumstances such as those presented in this case, these subsections extend the prohibition against denying public benefits because of a disability to a claimant who is the caregiver of a family member with a disability. Inasmuch as the DUA is a public entity covered by the ADA, its eligibility determinations must comply with 28 CFR § 35.130(g). Therefore,

qualified individual with a disability", under 430 CMR 4.45(2)(a), for the purposes of this case includes a caregiver who is related to a disabled individual, as a matter of law. See Doe v. County of Centre, PA, 242 F. 3d 437, 447 (3rd Cir. 2001) (adoptive parents of child with AIDS were "qualified individuals" entitled to ADA protection under the "relationship" test of ADA § 102(b)(4) and 28 CFR § 35.130(g).)

The claimant in this case is an applicant for unemployment benefits who is the sole caregiver of a family member who is a qualified individual with a disability. Specialists from [Hospital] have evaluated the claimant's daughter and concluded that she has substantial functional limitations in at least one major life activity. The claimant's daughter has a disability as defined under state and federal law. See 28 CFR § 35.104 and 430 CMR 4.44. Moreover, the review examiner found that it is because of her daughter's disabilities that the claimant is unable to seek full-time work. Thus, the claimant has met her burden to satisfy prongs (a) and (b) of 430 CMR 4.45(2).

The last part of our inquiry requires us to examine whether the claimant has so limited her hours as to effectively remove herself from the labor force. G.L. c. 151A, § 24(b) and 430 CMR 4.45(2)(c). In view of the fact that the review examiner found that employment exists in the fields and during the hours which the claimant is available for work, she has not effectively removed herself from the labor force and meets prong (c).

We, therefore, conclude as a matter of law that, under the facts presented here, the claimant has satisfied the requirements of 430 CMR 4.45(2) and (3), which allow her to limit her availability to part-time employment, for purposes of G.L. c. 151A, § 24(b).

The review examiner's decision is reversed. The claimant is eligible for benefits beginning the week ending October 11, 2008 and subsequent weeks, if she is otherwise eligible.

**BOSTON, MASSACHUSETTS**

**DATE OF MAILING - April 30, 2009**

/s/

John A. King, Esq.  
Chairman

/s/

Donna A. Freni  
Member

/s/

Sandor J. Zapolin  
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**

**(See Section 42, Chapter 151A, General Laws Enclosed)**

**LAST DAY TO FILE AN APPEAL IN COURT – June 1, 2009**

AB/rh